IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.77 OF 1991.

Mohanbhai Swamidas Patel .. Appellant
(Original Defendant.)

vs.

1. Tulsibai Ramgopal Jaju,
   C/o. General Attorney
   Shri Hiralal Kanhialal Bharadiya

2. Sau Ramkavarbai Hiralal Bharadiya
.. Respondents.
(Original Plaintiffs)

Shri V.A.Thorat with Shri V.A.Sugdare, Advocate for the Appellant.

Shri Anilkumar Patil, Advocate for the Respondent.

CORAM : S.R.SATHE, J.

DATED : 23RD AUGUST, 2004.

ORAL JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of 3rd Additional District Judge, Nasik, in Civil Appeal No.469 of 1985, whereby the judgment and order passed by the Court of 2nd Joint CJJD, Nasik in Regular Civil Suit

No.331 of 1982 dismissing the plaintiff's suit for perpetual injunction and mandatory injunction was set aside and the appeal was allowed, the original defendant has preferred this second appeal. (For the sake of convenience thereafter the parties shall be referred to as plaintiff and defendants.)

2. Brief facts giving rise to this appeal are as under :

. The suit property bearing Survey No.5869/3/4 was owned by plaintiffs. It was open plot./ Defendant took the same on lease on monthly rent of Rs.91/-. After the said property was taken on lease, the defendant started making construction on the suit plot. According to plaintiff without obtaining any written permission from the plaintiff's, defendant had started such construction though they were infact not entitled to carry out the same. The plaintiff, therefore, sent telegram on 25th April 1982 and informed the defendants to stop the construction. Inspite of the same the defendant continued to carry on the construction. The plaintiff therefore filed suit

for permanent injunction restraining the defendant from carrying out further construction and also prayed for mandatory injunction directing the defendants to remove the construction.

. The defendant resisted the suit claim by filing written statement at exhibit 19. The defendant, however, contended that open plot was not leased out to him, but on the contrary when the property was let out in the year 1968 , he carried out the construction on the plinth which was already in existence when the property was leased out to him. The defendant however contended that one Mr.V.R.Patil was Munim of the landlord Shri Ram Gopal and he granted permission to the defendant to carry out the construction. The defendant, therefore, contended that the suit construction is not illegal. The defendant also contended that he had not carried out any new construction, but he had merely carried out the repairs in respect of the then existing construction. He, therefore, prayed that the plaintiffs' suit be dismissed.

. On these pleadings the trial court framed issues. After considering the evidence adduced by both the parties, the trial court came to the conclusion that the open land was not only leased out to defendant but when the property was leased out, the plinth was already constructed and further the landlord had permitted him to carry out the construction. He, therefore, held that the construction in question was not illegal. Naturally, the plaintiffs' suit for permanent injunction and mandatory injunction was dismissed.

. Being aggrieved by the said order the plaintiff filed the Civil Appeal No. 465 of 1989 in the District Court , Nasik. After hearing both the learned Advocates the first appellate court came to the conclusion that ordinary civil court had jurisdiction to entertain the suit and only open plot was leased out to defendant, but defendant unauthorisedly carried out the construction on the open plot and as such allowed the appeal by setting aside the order passed by the trial court. The appellate court directed the defendants to demolish the entire construction

within 15 days. Being aggrieved by that order, the defendant filed the present second appeal.

3. From the perusal of the record it appears that at the time of admission this court has passed the following order " Ground no.g(i) is substantial question of law in this second appeal. Admit." The said g(i) reads as under: "Whether in absence of any specific finding of the Appellate Court that the construction had not taken place in 1968 or that it had taken place after the filing of the suit, decree for mandatory injunction is justified."

4. In this appeal before me, the learned advocate for the appellant has urged two points. Firstly, he submitted that the first appellate court has wrongly held that the ordinary civil court had jurisdiction to try the present suit. He also contended that the observation of the first appellate court that the Civil court had no right to issue mandatory injunction as per the provisions of Bombay Rent Act is not legal and correct. On the contrary, he submitted that the

present suit ought to have been filed under the Rent Act and the rent court alone had jurisdiction to try the present suit. However, as the suit is filed in the ordinary civil court, the said court had infact no jurisdiction in view of the provisions of section 28 of the Bombay Rent Act. Secondly, he canvassed before me that the appellate court has wrongly held that the defendant carried out the construction without the permission of the landlord and therefore passed the order of injunction which according to him is illegal. He, therefore, submitted that the appeal be allowed and the decree passed by the first appellate court be set aside. As against this the learned Advocate for the plaintiff supported the judgment and order passed by the first appellate Court.

4. It is not in dispute that the plaintiff is the owner , landlord of the suit property and the suit plot has been leased out to defendant on monthly rent of Rs.91/-. It is also an admitted fact that the suit property is situated at Nasik and the provisions of Bombay Rent Act are applicable to

the suit property. So, under such circumstances it is essential to find out whether the provisions of section 28 of the Bombay Rent Act are infact applicable to the facts of the present suit. It is needless to say that in order to find out the jurisdiction of the court one has to read the plaint and ascertain nature of the suit and see what in substance the plaintiff has asked for. Whatever may be the relief claimed, if on fair reading of the plaint it becomes aparent that the plaintiff has alleged relationship of landlord and tenant between him and the defendant and the relief claimed in substance relates to recovery of claim or possession or restricts the claim or question arising out of the rent act or in all its provisions then obviously the rent court will have jurisdiction to try such suit as per the provisions of section 28 of the Bombay Rent Act. Taking into consideration this position if we peruse the plaint in question it is very clear that the plaintiff specifically averred therein that there was relationship of landlord and tenant between him and defendant and open plot was leased out to defendant, but defendant without obtaining

written permission from the landlord carried out some construction on the open plot and as such the plaintiff is entitled to get permanent as well as mandatory injunction against the defendant. It is correct that in this suit the plaintiff is infact not asking for recovery of the rent nor he is asking possesion of the suit property. The suit is simplicitor for permanent injunction restraining the defendant from carrying out further construction and mandatory injunction directing the defendant to remove the construction which is already carried out. It was therefore argued on behalf of the plaintiff that the present suit will not come within the four corners of the provisions of section 28 of the Bombay Rent Act. However, it is well settled that it is not only the suit for recovery of land and the suit for possession of suit premises that fall under the provisions of section 28. If it appears that the suit involves any question arising out of the rent act or any of its provisions then also the suit comes under section 28 of the Bombay Rent Act. The learned Advocate for the appellant has drawn my attention to a case of Mirabelle Hotel vs.

Manu Subedar, 62 Bombay Law Reporter 222, wherein plaintiff had prayed for permanent injunction against the defendant restraining them from carrying out any alteration in the suit premises. Question arose whether the Bombay City Civil Court had jurisdiction to entertain and try the suit. Their Lordship of this Court held that the claim of the plaintiff for permanent injunction against the defendant arose out of S.12(1) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act and the Bombay Small Causes Court was invested by sec.28(1) of the Act with the exclusive jurisdiction of dealing with that claim. Similarly, in the instant case also we find that though the plaintiff has actually not claimed possession of the suit premises, admittedly the alleged construction is carried out on the open plot which is leased out to defendant and it is necessary to find out whether the defendant tenant would have any right to carry out such construction and whatever construction that has been carried out by him whether it would be termed as permanent construction. So, merely because the plaintiff has not actually claimed possession on

the ground that defendant has carried out permanent construction or carried out material alterations in the suit premises that does not mean that the present suit does not fall within four corners of the provisions of section 28 of the Bombay Rent Act. Infact from the perusal of the order of first appellate court it appears that the appellate court was also of the view that the relief of permanent injunction can be granted by the rent court as the suit is in respect of landlord and tenant in respect of the tenanted premises. However, the first appellate court observed that rent court has no right to issue mandatory injunction. I really fail to understand on what basis the first appellate court has made said observation. On the contrary, there are various authorities of this court wherein relief of even mandatory injunction have been granted by the rent court. The learned advocate for the appellant has placed reliance on a case Krishna Laxman Yadav vs. Narsingrao Vitthalrao Sonawane, 1973 Mh.L.J. 225, where infact tenants had filed suit in the Small Causes Court for declaration of right to occupy as tenants and for mandatory

injunction directing delivery of possession and restraining letting out of premises to others. Question arose whether the Small Causes Court had jurisdiction to try the said suit or whether the suit should have been filed in the City Civil Court. Division Bench of this court has held that Small Causes Court has jurisdiction to try such suit. So, it is very clear that the observation made by the lower court that mandatory injunction cannot be granted by the rent court is not correct. The learned Advocate for the respondent has placed reliance on case, Ramdular Sarjo Dhobi & Ors. vs. Ismail Suleman Kasam Multa and others 1990 Bom. R.C.320. In that case landlord wanted to restrain the defendant tenant who had carried out structure on open land, just as in the instant case. It is alleged that the defendant has carried out the construction on the open plot which was leased out to him. It is true that in the said case single judge of this court has observed that the suit being simplicitor for permanent injunction City Civil Court has jurisdiction. However, careful reading of the said authority indicates that in that suit there

was no mention that there was any breach of terms and conditions of tenancy or that there was any contravention of the Bombay Rent Act. Besides this it was not the case of plaintiff that each tenant has put up his respective tenaments or that he is putting up construction in breach of terms of tenancy. In the instant case plaintiff landlord has specifically averred that the defendant tenant has carried out construction in the tenanted premises i.e. open plot and has carried out construction without written permission, which he is not entitled to do as per the terms and conditions of the lease. So, it is very clear that the facts of the said case and the facts of the case in hand are quite different and as such the above cited ruling is of no use to the respondent. Thus from the above discussion I have no hesitation to hold that the present suit ought to have been filed in the rent court and not in the court having ordinary jurisdiction. So, under such circumstances, the plaint out to have been returned to the plaintiff for filing it before the proper court. Ofcourse, so far as Nasik is concerned, the court of Joint Civil Judge, Junior

Division is infact vested with the powers to try suit under the rent act , but still then the suit should have been filed under the rent act which has not happened. So, it should have been returned to plaintiff for that purpose. Thus as the ordinary Civil Court had no jurisdiction to try the suit it is necessary to interfere with the finding of the appellate court and allow the appeal and set aside the order passed by the first appellate court.

5. Once it hasbeen held that the ordinary Civil Court had no jurisdiction to try the present suit and as per the provisions of section 28 of the Bombay Rent Act, it ought to have been filed in the rent court, it was infact not necessary for the first appellate court to go to the other aspect i.e. whether the construction that is carried out by the defendant was illegal or whether he had carried out the said construction with the permission of the landlord. Hence, I pass the following order.

. The appeal is allowed. The order passed

by the first appellate court in Civil Appeal no.469 of 1985 is set aside. The plaint be returned to the plaintiff for presenting it to the proper court i.e. the rent court and valuing the suit on the basis that it is a suit under the Bombay Rent Act.

(S.R.Sathe, J.)